IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ALDERMAN, ET AL.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C.A. No. 04C-06-181-FSS
	)	**(E-FILED)**
CLEAN EARTH, INC., ET AL.,	)	
	)	
Defendants,	)	
	)	

Submitted: May 21, 2007
Decided: June 26, 2007

MEMORANDUM OPINION

Upon Plaintiffs' Motion for Reargument - - ***DENIED***.

SILVERMAN, J.

Plaintiffs have filed a timely motion to reargue the court's decision knocking out their experts under *Daubert*.[1] The two experts, Mulry and Wolfson, would have opined that Defendants injured Plaintiffs by polluting Plaintiffs' land. For the reasons presented in its decision, the court limited the bulk of the experts' testimony, especially their opinions on causation and damages.

Plaintiffs argue that the court misconstrued both Mulry's opinion and *Daubert*. Plaintiffs again argue that Mulry's conclusions are scientifically reliable because he did not hypothesize about the existence of pathways and corroborated his conclusions by site observations and sampling Plaintiffs' soil. Plaintiffs also claim that the court incorrectly applied *Daubert* because the court stated that certain testing must be done and failed to analyze *Daubert's* other factors. As to Wolfson, a physician, Plaintiffs argue that he did not need to examine Plaintiffs because he relied on all available soil data, not just Mulry's conclusions, to find that Plaintiffs require medical monitoring.

Plaintiffs misread and misstate much of the decision. For example, although the pathways Mulry identified are "normal, natural avenues for the movement of heavy metals. . . ," which are known and relied upon by experts in the field, that alone does not lead to the experts' conclusion that Defendants caused

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[1] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Plaintiffs' contamination. Similarly, the court never held that the experts had to perform specific tests. The court held, however, that some testing was necessary to support the experts' conclusions. The court merely identified, by way of example, testing that might have been performed.

Further, Plaintiffs' argument to the contrary notwithstanding, the court did not rely exclusively on Mulry's lack of testing. In its opinion, the court analyzed *Daubert*'s other factors. The court mentioned that the rate of error was unknown in this case without any experiments. And, the only theory subjected to peer review or publication is the known pathways' existence. Mulry's personal beliefs about causation and damages are his alone.

By the same token, the court never implied that Plaintiffs are presenting personal injury claims, but rather expressly stated that those claims were dropped. Plaintiffs' confusion on this point may stem from their continuing demand for medical monitoring, even though they now are only pursuing property damage claims.

Beyond the way Plaintiffs read the opinion, the motion's basic problem is that it just rehashes Plaintiffs' original arguments. Plaintiffs still insist that Mulry's conclusions are adequate and reliable. Plaintiffs argue again that the "known" pathways, Mulry's site observations, and the allegation that Defendants have historically mishandled toxins lead to the conclusion that Defendants caused

Plaintiffs' contamination.

As the opinion explains, Mulry's conclusions are only hypotheses, which remain untested. Under the scientific method, first, the expert gathers information, including empirical observations, to form a hypothesis.[2] Forming a hypothesis, however, is only the first step. The next step requires testing the hypothesis by collecting data and performing experiments.[3] Then, the data is analyzed to prove or disprove the hypothesis.[4]

As explained in the opinion, Mulry gathered information by briefly visiting Defendants' sites to make limited observations: He saw the wind kick-up dust. He reviewed DNREC tests that showed similar contamination on Plaintiffs' and Defendants' properties. He collected some meteorological and hydro-geological data about the area, suggesting pathways by which pollutants could have migrated from Defendants' properties to Plaintiffs'. And, he assumed that historically, Defendants mishandled toxins. From those things, he then concluded that Defendants probably caused Plaintiffs' contamination. But Mulry neither compared nor analyzed the

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[2] *See, e.g.,* Hugh G. Gauch, Jr., Scientific Method in Practice (Cambridge Univ. Press, 1st ed. 2003) and E. Bright Wilson, An Introduction to Scientific Research (Dover Publications 1991).

[3] *Id.*

[4] *Id.*

pollution by any scientific means, nor did Mulry do anything to establish that pollution actually migrated along the theoretical pathways he identified. Conversely, Mulry did nothing to eliminate other possible sources of contamination, such as nearby interstate truck traffic (lead) or lawn chemicals (arsenic). Mulry simply equated plausible possibilities with proven facts.[5]

Further, the cases that Plaintiffs now cite are either inapplicable or taken out of context. For example, *Stevenson v. E.I. DuPont De Nemours and Co.*[6] is completely different from this case. *Stevenson* is an appeal challenging a jury verdict on sufficiency of evidence grounds, and not a *Daubert* analysis. Even if *Stevenson* were applicable, it cuts against Plaintiffs. In *Stevenson*, the environmental expert evaluated air dispersion reports showing emissions were heavily concentrated over plaintiffs' properties.[7] Another expert then matched the metals found on plaintiffs' and defendant's properties. And, yet another expert found contaminants concentrated

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[5] *See, e.g., Empire Financial Services, Inc. vs. The Bank of New York*, Del. Super., C.A. 00C-09-235, Del Pesco, J. (June 8, 2007) (excluding expert's testimony as too speculative under *Daubert* because expert based conclusion on probabilities as opposed to facts, could not quantify damages, and did not look at other contributing factors).

[6] 327 F.3d 400 (5th Cir. 2003).

[7] *Id.* at 403-404.

on plaintiffs' roofs, proving that the pollution there, in fact, was airborne.[8] Thus, the evidence was sufficient to uphold plaintiffs' verdict.[9] In *Stevenson*, the experts proved their hypothesis about causation through actual testing. Also unlike this case, *Stevenson* did not involve multiple defendants. So, once causation was proved, there was no question about who to blame. Here, even if the jury accepted Plaintiffs' experts' opinions, the jury would have no way to establish each Defendant's liability.

According to Plaintiffs, *Stevenson* is helpful because plaintiffs won there "despite the absence of any 'depositional' tests to determine whether airborne contaminates actually landed on plaintiffs' properties." In other words, no one actually saw particles travel from defendant's property to plaintiffs' properties. *Stevenson* found that plaintiffs did not have to go to that length to prove causation because the air dispersion testing, particle matches, and the finding of particles on plaintiffs' roofs were enough. Had Plaintiffs produced the sort of evidence here that the experts in *Stevenson* produced, the result here would have probably been different. But here, again, no testing was done.

Also, the court understands the point of medical monitoring. The problem, again, is that this is a property damage case. Although it is probably the

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[8] *Id.* at 407.

[9] *Id.* at 408.

law, the court is not holding that medical monitoring only relates to personal injury claims. The court did not have to decide that legal question because neither Wolfson nor Mulry can prove that Defendants probably caused any harm to Plaintiffs, much less any justification for medical monitoring. If anything, Mulry's and Wolfson's opinions attributing the need for medical monitoring to Defendants are scientifically less sound than their other opinions. For example, as the decision mentions, Mulry and Wolfson did not address lead paint contamination or smoking.

Finally, the motion for reargument's last paragraph provides:

> However, to the extent that the court will premise its ultimate holding on the absence of such further testing, plaintiffs submit that they should be granted additional time for the experts either to demonstrate the futility of additional testing, or to identify and conduct any scientific procedures relevant to the "testing" of their opinions.

There are several, related reasons why the court will not grant Plaintiffs' request for more time. First, the court cannot tell precisely what Plaintiffs propose, much less how long it will take. Beyond that, the court does not know what it means "to identify and conduct any scientific procedures relevant to the 'testing' of [the experts'] opinions." In any event, the time has passed for Plaintiffs' experts "to demonstrate the futility of additional testing." If Plaintiffs believed that testing is futile, they should have explored that during the *Daubert* hearing. Moreover, this

case has been pending for over three years. It is the oldest case on my civil docket, not counting one that is in post-trial briefing. The sufficiency of Mulry's and Wolfson's opinions has been under direct attack for at least seven months. The expert discovery deadline passed last year. The court simply cannot take seriously a cryptic, open-ended offer unveiled in the last sentence of a motion for reargument. Plaintiffs' request is too little and too late.

For the foregoing reasons and as presented in the challenged decision, Plaintiffs' Motion for Reargument is ***DENIED***.

/s/ Fred S. Silverman
Judge

oc: Prothonotary (Civil Division)
pc: All Counsel of Record (via E-filing)